Supreme Court, U.S.
FILED
JUN 1 2001
OFFICE OF THE CLERK

No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DRUG FREE, INC.

ERNEST L. WILKERSON, JR.
KATHRYN M. MILEY*
WILKERSON AND ASSOCIATES CO., LPA
Attorneys for Respondent
Drug Free, Inc.
1422 Euclid Ave., Suite 248
Cleveland, Ohio 44115
(216) 696-0808

* *Counsel of Record*

167336

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court properly held that the Department of Transportation Regulations do not create an express private cause of action or support the existence of an implied cause of action.

2. Whether the trial court properly denied Petitioner's Second Motion for Leave to Amend the Complaint since he had not shown just cause for the amendment or that the new complaint would survive a motion to dismiss.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner Christopher Parry was an independent contractor of A.P.I.C. Petitioner's services were leased to Respondent Mohawk Motors of Michigan. Petitioner was selected for a random drug test required by the federal Department of Transportation Regulations. Respondent Austintown Ambulatory Emergency Room served as the collection site; Respondent MedExpress was the laboratory analyzing the sample; Respondent Defendant Drug Free, Inc. and its employee Dr. James Baber[1] served as the Medical Review Officer.

Respondent, Drug Free, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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1. Petitioner, the Court of Appeals, and the trial court incorrectly identify Dr. Baber as Dr. Haber.

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REASONS FOR DENYING THE WRIT

I. Petitioner has not met the standards for a petition for certiorari.

In his Petition for Certiorari, Petitioner does not offer any compelling reasons for this Court to grant certiorari as required by the Rules of the Supreme Court. Sup. Ct. R. 10. There is not a conflict between federal courts on an employee's right to bring a private cause of action under the Department of Transportation Regulations. In fact, the lower courts' rulings in this case conformed with the decisions of all courts who have addressed the issue, finding that there is no private right of action under the regulations promulgated pursuant to the Federal Omnibus Transportation Employee Testing Act (hereinafter "FOTETA"). *Salomon v. Roche Compuchem Laboratories, Inc.*, 909 F. Supp. 126 (E.D.N.Y. 1995); *Schmeling v. Nordam*, 97 F.3d 1336 (10th Cir. 1996); *Hall v. United Labs, Inc.*, 31 F. Supp. 2d 1039 (N.D. Ohio 1998); *Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387, 391 (N.D. N.Y. 1996).

Petitioner is, in fact, arguing that the trial and appellate courts' misapplied the *Cort v. Ash* test in considering whether there was a private cause of action for violation of the FOTETA Regulations and whether the trial court abused its discretion in refusing to allow him to amend his Complaint for the second time. *See* Petition for Writ of Certiorari, pages 9 & 22. Such issues are not appropriate for consideration by this Court since they do not raise any significant federal questions or seek to resolve a conflict between the lower courts. The Sixth Circuit's ruling was a correct application of the law, and, therefore, Respondent Drug Free, Inc. urges this Honorable Court to deny the Petition for Writ of Certiorari.

II. The Department Of Transportation Regulations Do Not Create An Implied Private Cause Of Action For Drivers.

Neither the Federal Omnibus Transportation Employee Testing Act ("FOTETA") nor the regulations promulgated thereunder expressly create a private cause of action. *See* 49 U.S.C. § 45102(a) & 49 C.F.R. §§ 40.21-40.39. Since a private cause of action is not expressly created by these provisions, the plaintiff must be able to demonstrate a clear Congressional intent to create a private remedy by the legislative scheme. *Salomon v. Roche Compuchem Laboratories, Inc.*, 909 F. Supp. 126, 128 (E.D.N.Y. 1995). The standard for determining whether an implied right of action exists under *any* federal statute: is (1) whether the plaintiff is part of the class of individuals that the statute was designed to benefit; (2) whether the legislative history indicates congressional intent to confer a private remedy; (3) whether creating a private remedy would further the purpose of the statute; and (4) whether plaintiff's cause of action is more related to state law. *Salomon*, 909 F. Supp. at 128 (citing *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *California v. Sierra Club*, 451 U.S. 287, 293 (1981); *Cort v. Ash*, 422 U.S. 66, 78 (1975)). These factors are used to determine whether Congress intended to create a private cause of action. *California v. Sierra Club*, 451 U.S. 287, 293 (1981).

A. The Petitioner is not part of the class of individuals that the statute was designed to benefit.

FOTETA authorized the Department of Transportation to establish drug testing programs "in the interest of motor safety." 49 U.S.C. § 31306(b). The Regulations state that

they are intended to prevent accidents and injuries from the use or misuse of alcohol and controlled substances. 49 C.F.R. § 382.101.

The statute and Regulations were not intended to benefit the privacy rights of individual drivers, but expressly authorized the invasion of those privacy rights. For example, if the circumstances warrant it, the employer can require an observed collection. 49 C.F.R. §§ 40.25(e)(ii) & (f)(16).

The fact that the statute and regulations mention the individual drivers does not establish that they were the intended beneficiaries of the statute. Petitioner's reliance on *First Pacific Bancorp, Inc. v. Helfer* is misplaced. *See* Petition, page 13 (citing 224 F.3d 1117 (9th Cir. 2000)). *First Pacific* analyzed whether shareholders had a private cause of action against the FDIC. *Id.*

In *First Pacific*, the court found that the individual shareholders were placed "on the same footing as the governmental authorities and with the general public . . ." in the statute. *Id.* 1121. There is no statutory or regulatory language in FOTETA or the regulations giving such status to truck drivers.

B. The legislative history does not indicate congressional intent to confer a private remedy.

The legislative history of FOTETA does not offer any indication of congressional intent to create a private cause of action for drivers. Congress specifically allowed for administrative enforcement of drug testing regulations through the administrative mechanism. *See, e.g.*, 49 U.S.C. §§ 507, 521, 31133, 31136, 31143,

31144, 31502. *See also* 49 C.F.R. § 382.1. "Such enforcement mechanisms are strong indicia that Congress did not envision a private right of action under the FAA's drug testing regulations . . ." *Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387, 391 (E.D.N.Y. 1996) (citing *Chan v. City of New York*, 1 F.3d 96, 102 (2d Cir. 1993).

This analysis has been repeated by various courts with the same result. In *Schmeling v. Nordam*, the Tenth Circuit Court of Appeals concluded that:

> Nowhere has Congress manifested an intent to allow a person other than the FAA Administrator or the Attorney General to enforce the drug-testing laws . . . we find no evidence that Congress intended to create a cause of action asserted by Schmeling, and we conclude that such a right does not exist.

97 F.3d 1336, 1337 (10th Cir. 1996). *See also Hall v. United Labs, Inc.*, 31 F. Supp. 2d 1039, 1042 (N.D. Ohio 1998).

Petitioner again relies on *First Pacific* for the proposition that when there is Congressional silence, the Court is free to create an implied cause of action. *See* Petition, page 13 (citing *First Pacific*, 224 F.3d at 1125). But as this Court has stated, "implying a private right of action on the basis of congressional silence is a hazardous enterprise at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 573 (1979). If there is to be a private right of action under a federal statute, "Congress must provide it. '[I]t is not for [the Court] to fill any hiatus Congress has left in this area.' " *Id.* at 578 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963).

The legislative history is silent on whether there is a private cause of action under FOTETA. However Congress specifically created an administrative enforcement mechanism. This is sufficient evidence that Congress did not intend to create a private cause of action under the statute.

C. Creating a private remedy would defeat the purpose of the statute and regulations.

Petitioner refers yet again to *First Pacific* to establish that a private remedy is consistent with the statute. *See* Petition, page 15. However, *First Pacific* actually demonstrates that a private remedy in the drug testing field would defeat the purposes of the statute and regulations.

In *First Pacific*, the court found that since there was not an administrative remedy, there must be a private remedy. 224 F.3d at 1126. In this case, there *is* an administrative remedy. *See, e.g.*, 49 U.S.C. §§ 507, 521, 31133, 31136, 31143, 31144, 31502. *See also* 49 C.F.R. § 382.1.

In addition, the *First Pacific* plaintiff sought an equitable remedy which would not defeat the Congressional intent or the administrative authority. 224 F.3d at 1125. Here, if Petitioner was awarded any equitable relief, it would be in direct conflict with the administrative regulations. The trial court would have to order the other parties to directly defy the regulations and the statute. Allowing a private remedy under FOTETA and the regulations would defeat the purpose of the statute, since drivers could circumvent regulations by seeking other remedies from a judge or jury.

The regulations' language regarding waiver does not establish that the Department of Transportation intended to

create a private cause of action. *See* Petition, page 20. The language cited only states that employees cannot be forced to waive liability. 49 C.F.R. § 40.25. Even if an employee cannot maintain a cause of action directly under the federal statutes and regulations, he or she can attempt to maintain a common law cause of action, which Appellant did in this case in his pendent claims.[2] *See* First Amended Complaint.

Neither Congress nor the Department of Transportation intended to create a private cause of action for individual drivers under FOTETA or the drug testing regulations. Therefore, this Court should decline to create such a cause of action now.

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2. Incidentally, if the Department of Transportation intended the regulations to create a private right of action, it almost certainly would have intervened in this action when requested by Petitioner or in one of the other cases on this issue across the county. *See* Plaintiff-Appellant Parry's Motion for Enlargement of Time to File Proof Brief, filed in the Sixth Circuit. It is also interesting to note that the Department of Transportation did *not* add any regulations on judicial remedy when the subject regulations were amended this past year. *See* Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 65 Fed. Reg. 79461 (2000) (to be codified at 49 C.F.R., Part 40). *See also* Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to Department of Transportation Final Rule; Proposed Rules, 66 Fed. Reg. 21491 (2000).

III. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT FOR THE SECOND TIME.

Rule 15 of the Federal Rules of Civil Procedure dictates the requirements of amending pleadings. After responsive pleadings have been filed, leave of the court is required to amend. Fed. R. Civ. P. 15(a) "[L]eave shall be freely given when justice so requires." *Id.* The court is not required to allow an amendment when there is undue delay, bad faith, dilatory motives, undue prejudice to the opposing party, or when the amendment would be futile. *Bethany Pharmacal Company, Incorporated, v. QVC, Incorporated*, 241 F.3d 854, 861 (7th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir. 1992); *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir. 1991)).

A. Petitioner's Motion for Leave to File Second Amended Complaint was untimely and prejudicial.

In this case, Petitioner did not demonstrate that justice required that he be granted leave to amend. He had been given leave to amend once, resulting in further delay and an even more confusing Complaint. *See* First Amended Complaint. The First Amended Complaint gave no notice of a future *Bivens* action. Then, Petitioner delayed nine more months and waited until the Motions for Summary Judgment were granted and a Motion for Reconsideration was denied to attempt to amend his Complaint again. *See* Motion for Leave to File Second Amended Complaint. This Motion caused undue delay and was made in bad faith.

In neither his Petition nor his Motion for Leave did Petitioner make an effort to demonstrate that justice required that he be given leave to amend. *See* Motion for Leave to File Second Amended Complaint and Petition, page 22.

Both the trial court and the Court of Appeals found it significant that Petitioner waited until

> nine months after he filed his first amended complaint and well over a year after he filed his original complaint. Moreover, at the time Plaintiff filed his motion to amend, the district court had granted summary judgment to Defendants two and one-half months earlier as well as denied Plaintiff's motion for reconsideration.

Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 306 (2000). Since an additional amendment would result in undue delay, bad faith, dilatory motives, and undue prejudice to the opposing party, the Motion for Leave to Amend was properly denied.

B. Petitioner's Second Amended Complaint would be futile.

Finally, "leave to amend should not be granted if the amended complaint should not withstand a motion to dismiss." *Fisher v. Roberts*, 125 F.3d 974, 978 (6th Cir. 1997). Petitioner claims that he is attempting to maintain a *Bivens* action in his proposed Second Amended Complaint for violations of his Fourth Amendment rights. *See* Petition, page 22. The *Bivens* Court held that when a "federal agent acting under color of his authority" violates the Constitution, the victim may recover damages from the agent. *Bivens v.*

Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

Drug testing regimes are clearly within the parameters of the protection of the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617-18 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676-79 (1989). The Fourth Amendment, however, bars only unreasonable searches. *Skinner*, 489 U.S. at 619.

> What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Id. at 619 (citations omitted).

Petitioner argues that a violation of the drug testing regulation is, in itself, an abuse of process constituting a Fourth Amendment violation. *See* Petition, page 23. The Second Circuit discussed the distinction between a violation of drug testing procedures and a Fourth Amendment violation. *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 171-72 (2d Cir. 1998). There is a distinction between impermissible abuse of discretion in requiring an employee to submit to a drug test contrary to a systematic, uniformly applied testing program, and alleged violations of urine specimen collection and testing procedures. *Id.* at 171-72. While the former category is adequate to make out prima

facie claim of a constitutional violation, the latter fails to state a claim upon which relief can be granted. *Id.*[3]

Finally, the facts of the present case counsel hesitation by this Court. A *Bivens* action is not created in situations where special factors "counsel hesitation." *Carlson v. Green*, 446 U.S. 14, 16-20 (1980); *Davis v. Passman*, 442 U.S. 228, 245-46 (1979). This analysis includes judicial deference to indications that Congressional inaction was intentional. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). When a program framework suggests that Congress has provided all enforcement mechanism that it deemed necessary, the Supreme Court has declined to provide new *Bivens* remedies. *Id.*

A *Bivens* action is inapplicable to the present matter. Petitioner's claim that the regulations were not followed does not automatically establish a Fourth Amendment violation. In addition, special circumstances counsel against extending this cause of action to the present situation since Congress clearly did not intent to create a private cause of action, but to leave enforcement to the Department of Transportation.

Since Petitioner's motion to amend his Complaint was untimely, unduly prejudicial, and futile, the Motion was properly denied. The issue raises no significant federal question that must be resolved by this Court. Therefore, Respondent requests that this Court deny certiorari on this issue as well.

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3. The *Stueart* case is completely irrelevant to the present action. *Stueart v. Arkansas Police Commission*, 329 Ark. 46 (Ark. 1997). While the Arkansas Supreme Court acknowledged that drug testing has serious Fourth Amendment implications, the case was a wrongful termination case. *Id.* The plaintiff was reinstated since his employer did not follow its own procedure in handling his drug test and subsequently terminating him. *Id.* at 53.

CONCLUSION

For all of the foregoing reasons, Respondent Drug Free, Inc. respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

ERNEST L. WILKERSON, JR.
KATHRYN M. MILEY*
WILKERSON AND ASSOCIATES CO., LPA
Attorneys for Respondent
Drug Free, Inc.
1422 Euclid Ave., Suite 248
Cleveland, Ohio 44115
(216) 696-0808

* *Counsel of Record*